1978

Federalism and Obscenity

Robert M. O'Neil
Indiana University School of Law - Bloomington

FEDERALISM AND OBSCENITY

Robert M. O'Neil

It is not known how conscious sellers of erotic publications are of the current state of the law. But if Jerry Lee Smith had had accurate legal information in the summer of 1974 when he mailed several magazines and films from Des Moines to people who had ordered them in other parts of Iowa, he would have thought he was beyond the reach of the criminal law. Earlier that year the Iowa legislature had amended the state's obscenity law[1] — following a recommendation of the President's Commission on Obscenity and Pornography[2] — to eliminate penalties for dissemination to adults and to retain only those sanctions designed to shield minors.[3] After the effective date of this new law, Smith clearly could not have been prosecuted in the state courts for an obscenity offense.

Federal authorities, however, took a different view of Smith's activities. Postmasters in several Iowa communities to which the publications had been mailed withdrew them upon arrival and returned them to the sender, while giving the relevant information to the United States Attorney. Smith was then tried and convicted in the federal district court, despite his claim that the new Iowa law excused him from federal as well as state sanctions. The Court of Appeals affirmed,[4] and the Supreme Court by a 5-4 margin in *Smith v. United States*[5] held that the jury had properly followed its own view of "community standards" and was not constrained by the more lenient terms of the Iowa statute. The majority reached two conclusions of central importance: one, that the state legislature could not "freeze a jury" in the application of community standards to allegedly obscene material;[6] the other, that in any event state law was irrelevant in a federal prosecution where the substantive standards were shaped by federal

---

* Vice President-Bloomington and Professor of Law, Indiana University. A.B. 1956, A.M. 1957, LL.B., 1961, Harvard University.

1. IOWA CODE § 725 (1975).

2. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT 53 (1970).

3. 1974 Iowa Acts ch. 1267, 1268, at 977.

4. The per curiam opinion of the Court of Appeals was not reported; indeed the court directed that its opinion not be printed or published. It appears in Smith v. United States, 431 U.S. 291, 43-46 app. (1977).

5. 431 U.S. 291 (1977).

6. *Id.* at 302.

law.[7] The majority also rejected Smith's claim that prospective jurors should have been allowed to answer questions about their understanding of "community standards."[8] Four Justices dissented — three (Brennan, Stewart and Marshall) in a brief opinion restating their earlier views that the federal postal-obscenity law was constitutionally overbroad.[9] Justice Stevens expressed his dissenting views at greater length,[10] reviewing critically the process by which the Court had handled the obscenity issue since its 1973 decision in *Miller v. California*.[11]

The *Smith* case poses several questions, some special to obscenity law, and others central to the role which state law plays in the federal courts. This article will concentrate on the federalism aspect of *Smith*, although a concluding section will summarize briefly the major implications of the case for obscenity and first amendment law.

I. *Smith*, SMUT, AND FEDERALISM

To place the federal-state relationship issue in context, we must understand the condition at the time of the trial of a "triangle" of law, that is, the intersection of three separate bodies of law: federal statutory law, constitutional case law, and state statutory law. Earliest of these was the 1883 federal statute which makes it a crime, among other acts, to use the mails for the sending of "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[12] Congress has never defined the operative terms, including "obscene"; it has simply been assumed by the courts that definitions were a matter of federal law. In the early cases federal judges turned to legal dictionaries and like sources, for elaborations of the meaning of "obscene" and the several other terms.[13] As a result, the definitions were quite broad and imprecise; phrases such as

---

7. *Id.* at 303-05.

8. *Id.* at 308.

9. *Id.* at 310-11.

10. *Id.* at 311-21.

11. 413 U.S. 15 (1973).

12. 18 U.S.C. § 1461 (1970).

13. *E.g.*, United States v. Males, 51 F.41 (D. Ind. 1892); United States v. Martin, 50 F. 918 (W.D. Va. 1892). For evidence of the transition to more modern and more precise standards, see United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934); United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913). *See generally* J. PAUL & M. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

"tend[ency] to deprave morals" or "offensive to chastity and modesty" appeared in the earlier cases.[14] It was not, in fact, until 1957 in *Roth v. United States*[15] that the Supreme Court intervened in the definitional process. *Roth* arose under the postal-obscenity statute and therefore provided long needed guidance on the substantive standard. The case was significant not only for the definition it offered, but for the Court's attempt to articulate a uniform national standard which would govern state as well as federal obscenity cases. The commitment to a national standard was, of course, strongly reaffirmed in the mid 1960's with the adoption of the "hard core" test — the requirement that material to be found obscene must be shown to be "utterly without redeeming social value."[16]

Then in 1973 the course of decision was suddenly reversed; in *Miller v. California*,[17] the new majority of the Court abandoned the quest for a single national standard, and held that juries must apply essentially local standards. One element of the new formula replaced the "utterly lacking" test with the inquiry "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[18] In order to find a work obscene, the jury must decide "whether the average person, applying contemporary community standards would find that the work . . . appeals to the prurient interest . . . [and] . . . whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[19]

The possible role of state law in federal cases had never been seriously considered until this time. *Miller* did, however, at least invite speculation about a new dimension of federalism in the obscenity field; since juries were to apply a standard which had less than nationwide scope, the role of the state legislature had now to be assessed. *Miller*, to be sure, was a state case, and the effect of the new test in the federal courts remained uncertain. The next year the Court reviewed a federal postal conviction in *Hamling v. United States*,[20] which held that the jury's function was no less in the federal

14. *See, e.g.*, Dunlop v. United States, 165 U.S. 486, 501, 502 (1897); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

15. 354 U.S. 476 (1957).

16. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 418 (1966).

17. 413 U.S. 15 (1973).

18. *Id.* at 24.

19. *Id. See generally* Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838 (1975) (a recent review of *Miller* and its impact on the fact-finding process).

20. 418 U.S. 87 (1974).

courts than in state obscenity cases and which marked as the appropriate "community standard" that of the federal judicial district from which the jury was selected. Despite the greater deference now paid to the jury in the definitional process, and the absence of a single national standard, the Court reaffirmed its earlier judgment that the federal postal-obscenity law was not excessively vague or overbroad.[21] *Hamling* failed, however, to clarify the role that state law might play in a federal prosecution.

This discussion brings us back to the third leg of the triangle in *Smith* — the unusual posture of the Iowa law at the time of the mailings charged in the federal prosecution. Until 1974, Iowa's obscenity statute was like that of most other states; it forbade the dissemination of obscene materials to adults as well as to minors.[22] After this law was struck down by the state courts in a post-*Miller* case,[23] however, the Iowa General Assembly took the bold step of decriminalizing distribution of obscenity to adults, retaining only the ban on sales to minors.[24]

Though the Iowa legislature eventually took back its bold step,[25] during the life of the 1974 revision a person could not have been convicted in the state courts for the acts charged against Smith in the federal indictment. There was no claim that any mailings had been made to or even seen by minors; all the acts charged in fact involved adults who had specifically requested the publications. The possible relevance of the Iowa law to the federal case was enhanced by the wholly intrastate character of the

21. *Id.* at 114.

22. IOWA CODE §§ 725.5, 725.6 (1973).

23. State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973); *see also* State *ex rel.* Faches v. N.D.D., Inc., 228 N.W.2d 191 (Iowa 1975).

24. 1974 Iowa Acts ch. 1267, 1268, at 977. For similar steps taken by several other states, see, *e.g.*, WASH. REV. CODE § 9.68.060 (Supp. 1974); WIS. STAT. ANN. § 944.25 (West Cum. Supp. 1975). Such a limitation was, in fact, suggested by the plurality of the Supreme Court as long ago as Jacobellis v. Ohio, 378 U.S. 184 (1964), where Mr. Justice Brennan observed: "State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination." *Id.* at 195. Also in the background, of course, is Ginsberg v. New York, 390 U.S. 629 (1968), in which the Court upheld a state statute which imposed stricter standards on the determination of obscenity of materials distributed to minors. On the other hand, the Court has never repudiated Butler v. Michigan, 352 U.S. 380 (1957), in which the majority warned that selective laws or enforcement could not "reduce the adult population of Michigan to reading only what is fit for children." 352 U.S. at 383. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 662 n.44, 663 n.49 (1978).

25. As of 1 January 1978, sales to adults were once again proscribed, though under a narrower definition of "sexual conduct" than that contained in the pre-1974 law. IOWA CODE § 2804 (1978).

mailings. Thus a pure test was presented of the role of state law which defined forbidden conduct more narrowly than did the general provisions of the United States Code.

To this point we have assumed "the relevance of state law" through a single channel. It would be instructive at this point to identify several quite different roles which the Iowa law might have played in a federal prosecution.[26] At the far end of the scale, one could argue that a federal indictment charging intrastate acts exempt from state law should simply be dismissed. A less drastic approach would be to allow the case to go to the jury, but under instructions governed by the Iowa statute; thus if the jury found the defendant guilty without evidence of sales to minors, such a verdict must be set aside. A third possibility would be to instruct the jury on the basis of the state law — that is, telling them that Smith's conduct was definitely not in violation of the Iowa statute — but nonetheless to allow a conviction to stand if the jury chose to disregard the state law. A fourth approach, one for which the defendant argued early in the trial, would permit defense counsel to question prospective jurors on their understanding of the current Iowa law, as well as their general awareness of contemporary community standards; such questions would not have given the statute dispositive force but would at least have allowed it to shape the selection of the jury.

Two possible options remain. A fifth would be for the trial court to insist that the Iowa law be introduced as evidence of the "contemporary community standards" which the jury must apply, but without precluding recourse to other sources. The sixth and final approach — the one actually taken in the *Smith* trial — would be to allow the statute to be introduced into evidence, but without attributing to it any special legal significance. In this instance, the prosecution simply submitted the materials, without any evidence bearing on community standards; the judge instructed the jury to "draw on your own knowledge of the views of the average person in the community" — a charge which invited jurors to give the statute as much or as little weight as they wished.

The question now before us, as before the Supreme Court, is whether the Iowa statute should have received a greater degree of deference — that is, whether any of the first five options outlined above should have been applied. We may concede that a federal court would not dismiss an

---

26. For a more general discussion of this issue, see P. BATOR, D. SHAPIRO, P. MISHKIN, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1262-73 (2d ed. 1973), [hereinafter cited as HART AND WECHSLER].

otherwise valid prosecution simply because the same case could not have been brought in the state courts. But there are less drastic ways in which the state and federal law might have been reconciled. The question here, therefore, is not *which* of the rejected options should have been adopted, but only whether *any* of them would better have maintained the balance between two dissonant bodies of law than the option actually selected by the district court and ultimately approved by the Supreme Court. We simply ask whether the Iowa statute was entitled to something more than a casual evidentiary role in the federal prosecution.

To pose the dilemma of the *Smith* case more broadly, we might begin with two general propositions. The first is that states lack the power under our federal system to decriminalize conduct which federal law proscribes. The other proposition is that there exists a federal interest in protecting the morals of citizens of a state whose lawmakers have declared that such morals do not need such protection. This is at best tenuous, although the federal *power* to grant such protection may indeed exist. Both propositions must be developed more fully to understand the central dilemma of the *Smith* case.

On the one hand, it is elementary that a state cannot prevent the federal government from punishing conduct by declaring that such conduct does not violate state law. If federal power exists under the Constitution, that power may be exercised, even with regard to wholly intrastate activities, notwithstanding any views of the state legislature to the contrary.[27] What is true in volatile areas such as school desegregation or civil rights must be equally true for such matters of lesser majesty as the use of the mails for purposes which Congress has deemed inimical to the interests of the United States. Congress has plenary power over the mails — not only to protect but also to exclude and, as it turns out, to censor on content grounds as well.[28]

The second proposition seems difficult to reconcile with the first. Granting that plenary federal power over the mails does exist, the application of that power to the field of obscenity raises special questions.

---

27. *E.g.*, Free v. Bland, 369 U.S. 663 (1962); *cf.* McDermott v. Wisconsin, 228 U.S. 115 (1913). (State legislation cannot impair legislative means provided by Congress in the Federal Pure Food and Drugs Act for the enforcement thereof).

28. *See, e.g.*, Electric Bond & Share Co. v. SEC, 303 U.S. 419, 442 (1938); *Ex parte* Jackson, 96 U.S. 727, 736-37 (1878) (affirming power of Congress to exclude lottery materials from the mails); L. TRIBE, *supra* note 24, at 252-53. *But cf.* Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (limitations on congressional authority).

Some postal laws are clearly designed to protect the mails,[29] and thus serve, as Professor Louis B. Schwartz long ago defined the functions of federal criminal law, "to punish anti-social conduct of distinctively, if not exclusively, federal concern."[30] But the laws which bar the use of the mails to send obscene matter fall under the second of Professor Schwartz's categories — "to punish conduct of local concern, with which local enforcement authorities are unable or unwilling to cope."[31] Typically, federal sanctions of the second type reinforce local law enforcement activity, and concurrent jurisdiction is thus welcomed by the states and localities.[32] There may be questions about the propriety of punishing a person twice for a single act which violates both federal and state law, and we shall look more carefully at that issue in a later section.[33] Here, however, we are concerned with the anomalous situation in which the lawmakers of a state have declared that they do not wish certain conduct to be criminal, and federal authorities have proceeded to prosecute it nonetheless. Ordinarily, such a dissonance of objectives should simply be worked out through the political process, since the possibility of discord between federal and state prosecutors inheres in our federal system.

There is a strong argument, however, that the resolution should be different in the case of obscenity. For some time there have been reservations about the distinctively *federal* interest in punishing the distribution of obscene materials. Twenty years ago Mr. Justice Harlan declined to affirm the postal-violation conviction in *Roth*, and expressed his doubts about the federal role in this field: "Not only is the federal interest in protecting the Nation against pornography attenuated, but the

---

29. 18 U.S.C. § 1691 *et. seq., e.g.*, provides penalties for offenses relating to postal service such as obstruction of mails, theft of or injury to postal equipment, avoidance of postage fees, etc.

30. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 66 (1948).

31. *Id.* Professor Schwartz later observes:

> To enlist the federal power in the battle against obscenity, lotteries, theft, alcoholism, and prostitution is not to protect federal prestige, but to hazard it; it does not solve federal administrative problems but creates new ones; it does not vindicate federal authority in matters of distinctively national concern against possible local obstruction, but steps into local issues. Federal intervention also has a tendency to weaken the enforcement efforts of state authorities.

Id. at 70.

32. *See, e.g.*, 18 U.S.C. § 2113 (federal offense to rob any member bank of the Federal Reserve System).

33. *See* notes 66-74 *infra* and accompanying text.

dangers of federal censorship in this field are far greater than anything the States may do;[34] the Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of 'thoughts.' "[35]

As though in partial response to Justice Harlan's doubts, the Burger Court in 1973 did abandon the quest for a single national standard of obscenity in favor of local judgments.[36] More significant, however, than *Miller's* "anti-nationalism" may have been the positive character of its "localism." The interests to be protected by leaving the judgment of obscenity to juries chosen from the community are, of course, those of states and localities, since there is no longer an identifiable national set of interests. On several occasions in the recent cases, the Court has recognized that "the States have considerable latitude in framing . . . 'contemporary community standards.' "[37] Indeed, the Court has explicitly recognized that some states may wish less protection than the Constitution (as interpreted in *Miller*) would allow, just as others may wish to take their laws to the limit: "The States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer."[38] There is thus the basis of an argument that states were expressly invited to do just what Iowa did in 1974, with an expectation that federal agencies would respect the state's definition of its protectable interests.

If the interests being protected through the obscenity laws are indeed the morals and values of the state, and if the lawmakers of that state decide that adults no longer need such protection, a federal prosecution for wholly intrastate sales becomes at least anomalous. Professor Schauer, in his recent reatise on the law of obscenity, observes:

> If the state law of the relevant community does not make obscenity a crime, or perhaps only includes minors, then the law, theoretically embodying the wishes of the community, should be probative as to the standards of the community. If the community does not make the activity a crime, it can be said that it does not offend the community.[39]

---

34. Roth v. United States, 354 U.S. 476, 505 (1957) (Harlan, J., concurring and dissenting).

35. *Id.* at 507.

36. Miller v. California, 413 U.S. 15 (1973).

37. Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

38. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973). For a pre-*Miller* suggestion to the same effect, see United States v. Reidel, 402 U.S. 351, 357 (1971).

39. F. SCHAUER, THE LAW OF OBSCENITY 134 (1976). For the suggestion that the

A paradox thus clearly emerges from these two basic propositions; namely, though a state may not simply stay the operation of federal law simply by narrowing its own criminal sanctions, a complete disregard of the Iowa statute in a federal prosecution for intrastate mailings to adults seems inconsistent with the Supreme Court's growing deference in obscenity cases to local values, mores, and interests. The difficulty is to identify principles of federal-state relations which will provide a better accommodation than the *Smith* decision itself provided. Several analogies may be helpful, although none is perfect. First, we will examine principles of federal preemption, or the status of state law under the Supremacy Clause in areas of shared responsibility. A second, possibly apposite, inquiry is the role that state law plays in federal court proceedings, whether incorporated by express reference, or adopted through judicial discretion to fill gaps in the federal body of law. A third concept which may offer some guidance is that of successive prosecutions, under state and federal law, for a single act which violates both.

A. Federal Preemption of State Law

We begin with the subject of federal preemption and the Supremacy Clause, since this is the most familiar of the analogies. Through a long and not always consistent line of cases, the Supreme Court has held that federal law preempts or displaces state law in the absence of a clear expression of Congressional intent to the contrary only to the extent of an actual conflict between the two bodies of law, or where the subject matter by its nature requires a uniform national standard, or where the operation of federal law (or the achievement of a strong federal policy) would be threatened by the coexistence of both laws.[40] The cases of direct conflict are quite rare. Most preemption decisions turn either on evidence of Congressional intent to occupy the field, or a judgment that the need for uniformity or the strength of a national interest requires state law to yield.[41]

None of the factors mandating preemption seems remotely present in the obscenity area. While regulation of imports from foreign countries

---

Supreme Court's deference to community standards in the obscenity area is consistent with a broader deference to state and local standard-setting and regulation, see *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1180-81 (1977).

40. *E.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); L. TRIBE, *supra* note 24, at 376-91.

41. *E.g.*, Campbell v. Hussey, 368 U.S. 297 (1961); *see generally* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

may require exclusive federal control,[42] the same cannot be said of dissemination through the domestic mails.[43] Some states in fact have in their own laws provisions paralleling the federal postal obscenity ban,[44] and the concurrent application of such laws has never seriously been questioned. The recent Supreme Court decisions have, if anything, more clearly foreclosed any possible preemption claim; the abandonment of any possible national standard of obscenity, and the preference for local juries defining community standards, surely argue against exclusive federal superintendence.

The ease with which we conclude that power is shared does not, however, make preemption law meaningless. Certainly the federal postal obscenity statutes do not prevent Iowa from enacting its own parallel or concurrent laws. Nor, as the Supreme Court has recently said, do the federal laws prevent Iowa from adopting a more lenient attitude toward obscenity. But the issue is not whether state law is free to function in the *state* courts, but the more difficult question whether the state definition of obscenity plays any role in *federal* prosecutions. A finding of non-preemption may help, but only slightly. The question here is not the one we would have if, for example, Congress defined obscenity one way and the Iowa legislature defined it differently; under the recent Supreme Court cases a jury of Iowa citizens in a federal prosecution for intrastate mailings would be free to adopt the state definition rather than the federal one. The *Smith* jury could certainly have acquitted had they shared the legislative view that only minors needed protection from obscenity. The trouble was that Iowa jurors held a more restrictive view than that of their elected lawmakers, and thus reached a verdict they would not have been allowed to reach in a state court. Thus our conclusion that Iowa's more lenient law is not preempted means only that jurors (and presumably the district judge) *could* have used it as the source on community standards, but not that they were constitutionally *required* to do so.[45]

---

42. *Cf.* Graham v. Richardson, 403 U.S. 365 (1971); (state statutes denying welfare benefits to resident aliens encroach upon exclusive federal power over the entrance and residence of aliens); Hines v. Davidowitz, 312 U.S. 52 (1941) (state's power to regulate aliens as a distinct group is subject to the national legislative and treaty-making powers).

43. *See, e.g.*, Schwartz, *supra* note 30, at 70.

44. *E.g.*, DEL. CODE tit. xi § 1361 (Supp. 1977); VA. CODE § 18.2-374 (1975).

45. This conclusion with regard to federal-state relations in the obscenity field does not affect, or undermine the force of several recent decisions preempting *local* regulation of obscenity as a matter of *state* law. *See, e.g.*, Whitney v. Municipal Court, 58 Cal. 2d 907, 377 P.2d 80, 27 Cal. Rptr. 16 (1962); People v. Llewellyn, 401 Mich. 314, 257 N.W.2d 902 (1977); Dimor, Inc. v. City of Passaic, 122 N.J. Super. 296, 300 A.2d 191 (1973). The arguments

B. *Incorporation and Borrowing—Choice of State Law in Federal Proceedings*

A second analogy is the broad range of situations in which federal courts employ state law to fill lacunae in federal law. The most obvious situation is the doctrine of *Erie R.R. v. Thompkins,*[46] which refers many substantive and some procedural issues to state law in federal civil suits based on diversity of citizenship.[47] We put these cases aside for obvious reasons.

Closer to the mark are the various uses of state law in federal question litigation. Sometimes, as under the Federal Tort Claims Act,[48] Congress has decreed that state law will be used, and the district court has no option. In other situations, discretion exists whether to fill gaps in federal law by reference to state law. Several elements have guided this choice — the strength of the federal interest (as when the United States is a party to the litigation); the nature of the issue which creates the gap; and the degree to which the applicable state law would provide a helpful solution.[49] The "subject matter" test has caused federal courts to look to state law in such areas as domestic relations, land titles, claims to mineral rights, and the like.[50] On the other hand, such areas as environmental protection and enforcement of arbitration awards have been felt to require a uniform body of federal law — even where none existed before, and without regard for the adequacy of available state law.[51]

---

which support such judgments as a matter of state law do not lead to a comparable result at the federal level, especially after *Miller.*

46. 304 U.S. 64 (1938).

47. For recent comments, see Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Mishkin, *Some Further Last Words on Erie — The Thread,* 87 HARV. L. REV. 1682 (1974).

48. 28 U.S.C. § 2674 (1970); *see* Massachusetts Bonding Co. v. United States, 352 U.S. 128, 134 (1956).

49. *See* Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U. CHI. L. REV. 823, 832-33 (1976).

50. *E.g.,* De Sylva v. Ballentine, 351 U.S. 570 (1956) (question of whether an illegitimate child comes within the term "children" as used in federal statute to be determined by reference to state law); R.F.C. v. Beaver County, 328 U.S. 204 (1946) (federal act authorizing state taxation of governmental property construed as referring to state law for determination of what is taxable as real property). *But cf.* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (federal court, in interpreting federal land acquisition contract, not bound by retroactively enacted "aberrant or hostile" state laws).

51. *E.g.,* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (recognition of federal common law in federal environmental statutes); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (substantive law in federal labor arbitration to be fashioned by national labor policy).

Among the factors encouraging a choice of state law within the discretionary zone, a recent note finds especially persuasive "a tradition of local control over the area of law in which the adoption [of state law] question arises."[52] Where a disregard of state law by a federal court would be likely to cause a significant disruption in the scheme of state regulation, the case for using state law is paramount.[53] Even where such "disruption" is not threatened, the strength of the state interest and the "tradition of local control" are typically respected by the federal judge facing a choice of law issue.[54]

The regulation of obscenity seems an especially suitable area for deference to state law. That judgment does not, however, compel the district judge to adopt state law, or require that the jury do so. Smith's claim is not that the jury was improperly charged under a federal common law standard which did violence to the Iowa law, but rather that the jury was given virtually no substantive guidance from any source. Presumably if the district judge had found that the Iowa statute embodied an appropriate community standard, and instructed the jury to follow it, the Supreme Court would not have set aside an otherwise valid conviction. But the judge was not persuaded that the Iowa statute had anything more than incidental evidentiary value, and the Supreme Court found that judgment equally supportable.

Most of the cases involving incorporation of state law arise on the civil side of the federal courts, leaving even less clear the proper standard for criminal cases. There is at least one type of federal criminal case in which state law plays a prominent and formally assigned role — the prosecution under the Assimilated Crimes Act[55] of conduct occurring in federal enclaves. Since there is no general federal criminal law, and since state and local laws do not of their own force apply on military bases, in federal prisons, post offices, and the like, Congress has chosen to adopt the criminal law of the state to plug the resulting gap. The Supreme Court has held that the Assimilated Crimes Act may not be used if the conduct violates any federal law; in other words, a true gap must exist before state law can fill it.[56] Moreover, the borrowing process affects the scope of

52. *See* Note, *Adapting State Law*, *supra* note 49, at 842.

53. *Id.*

54. *Id.* at 855-56.

55. 18 U.S.C. § 13 (1970); *see* HART AND WECHSLER, *supra* note 26, at 1267.

56. Williams v. United States, 327 U.S. 711 (1946); United States v. Butler, 541 F.2d 730 (8th Cir. 1976); *cf.* Fields v. United States, 438 F.2d 205 (2d Cir. 1971) (not improper for the

neither body of law, but simply serves to harmonize the sanctions of the federal enclave with those in the surrounding community.[57]

The Assimilated Crimes Act may shed two kinds of light on the *Smith* case. It does illustrate the anomaly which results from enforcing a federal standard harsher than that which the state itself applies. Suppose, for example, that Smith had sold the very same magazines to the very same consenting adults in the lobby of the Des Moines post office rather than dropping them into the mail chute. Under the Assimilated Crimes Act, federal law could not reach the in-person sale since Iowa law did not proscribe it. There is something perverse, though presumably not unconstitutional, about such a difference in result derived from the seller's choice of means of dissemination.

The Assimilated Crimes Act may have a second oblique relevance to the *Smith* case. When Congress wished to incorporate state law, it clearly knew how to do so, and has done precisely that on several occasions. One could argue that a failure to make similar provision in other contexts implies an intent *not* to follow state law — although in civil litigation federal courts have not been deterred by the absence of authorization to adopt relevant state law.

One very recent case exemplifies the uncertainty of the role of state law in federal criminal proceedings. In *United States v. Craig,*[58] a member of the Illinois House of Representatives was indicted in federal court for racketeering activities in violation of the Hobbs Act.[59] He sought to suppress certain portions of testimony he had given to postal inspectors and an Assistant United States Attorney, arguing that such statements were privileged under the speech and debate clause of the federal Constitution,[60] and under a similar provision of the Illinois State Constitution.[61] The district court sustained the motion to suppress. A panel of the court of Appeals for the Seventh Circuit initially agreed that such a privilege existed as a matter of federal common law, but reversed the order on the ground that the privilege had been waived.[62] Several months later the full Court of Appeals overruled the panel, holding that the only possible basis

federal government to prosecute defendant for shooting with intent to kill under state law where the federal statute proscribed assaults and the Ohio statute prohibited batteries).

57. Williams v. United States, 327 U.S. 711, 718 (1946).

58. United States v. Craig, 537 F.2d 957 (7th Cir. 1976).

59. 18 U.S.C. § 1951 (1970).

60. U.S. CONST. art. I, § 6.

61. ILL. CONST., art. IV, § 12 (1970).

62. United States v. Craig, 528 F.2d 773 (7th Cir. 1976).

of the legislator's claim was the common law doctrine of official immunity, which did not in any event extend to criminal liability.[63] Only Chief Judge Fairchild considered the possible relevance of the Illinois state constitution; he argued that "the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution"[64] — though he agreed with the panel that any possible privilege had been waived. Even if the Fairchild view had prevailed, there would still be some doubt about its value to Smith; the Illinois legislator's claim to a federal-prosecution defense based on a state constitutional provision seems an unusually persuasive one, since the provision in question derives from the separation of powers and the integrity of legislative functions.[65] There is, however, a useful analogy, and an illustration of the still uncertain status of state law in federal criminal proceedings.

This discussion of the role of state law in the federal courts leads us to essentially the same conclusion we reached under the preemption heading: while a federal court might well be guided to a greater degree than in *Smith* by more lenient state obscenity law, nothing in the constitution or in principles of federal-state accommodation seems to require adoption of state standards. Had the district judge felt the federal obscenity laws excessively vague after *Miller,* and wished to give the jury clearer guidance, he might well have accorded the Iowa statute greater weight. Beyond that, however, he was not required to go.

C. *Dual Sovereignties: The Relationship Between Federal and State Prosecutions for a Single Offense*

A third analogy is suggested by occasional concurrent or consecutive federal and state prosecutions for a single act in violation of both bodies of law. Suppose, for example that Smith had been charged in the state court with selling obscene materials, but was acquitted for any of several possible

63. United States v. Craig, 537 F.2d 957 (7th Cir. 1976).

64. *Id.* at 959.

65. *Cf.* Tenney v. Brandhove, 341 U.S. 367 (1951); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 HARV. L. REV. 1113 (1973). For a discussion of the *Craig* case itself, see Comment, *A Speech or Debate Privilege for State Legislators Who Violate Federal Criminal Laws?,* 68 J. CRIM. L. 31 (1977). In a later case, the Court of Appeals for the Third Circuit discussed the possible availability of the federal and state constitutional privilege to a state legislator under investigation by a federal grand jury but opted in favor of a federal common law privilege. On the facts of the case, the privilege did not really apply, but the discussion is relevant to the *Craig* issue. *In re* Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977).

reasons (including failure of proof that minors were involved). Suppose the United States Attorney then sought a new indictment based on the very same distribution, under the postal obscenity laws. Could Smith assert a substantial claim of double jeopardy? The answer is probably negative, although the Supreme Court has not ruled directly on the issue since 1959. In *Abbate v. United States*,[66] a majority of the Court held that a federal prosecution was not barred by prior conviction on a similar state charge growing out of the same conduct. Although earlier cases had stressed recognition of "two sovereignties, deriving power from different sources,"[67] the *Abbate* Court emphasized a more practical element — the extent to which "the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions."[68] The only alternative to successive prosecutions would be some procedure by which the Federal Government could preempt (and thus *prevent*) any state prosecutions for conduct which might also violate federal law. Such a procedure would be "highly impractical".[69] the Court recognized, leaving no feasible alternative but the possibility of cumulative trials in different forums.[70]

The continuing value of the double jeopardy cases and their relevance are clouded by two factors. One, of course, is the subsequent decision of the Supreme Court to extend the guarantees of the double jeopardy clause to the states through the fourteenth amendment.[71] For this reason alone, the Court might well not reach the same result today, at least in the case where the federal prosecution preceded that of the state for the single offense.[72]

The other source of uncertainty is the Court's reluctance to invoke the old "dual sovereignties" concept of *Abbate*. Earlier cases spoke majestically of "[e]ach government in determining what shall be an offense against its peace and dignity . . . exercising its own sovereignty, not that of the other."[73] The *Abbate* Court did not expressly disavow this concept,

66. 359 U.S. 187 (1959).

67. United States v. Lanza, 260 U.S. 377, 382 (1922).

68. Abbate v. United States, 359 U.S. 187, 195 (1959).

69. *Id.* at 195.

70. *See also* Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966).

71. Benton v. Maryland, 395 U.S. 784 (1969).

72. Bartkus v. Illinois, 359 U.S. 121 (1959) would, under this view, be decided differently today. *Bartkus*, a companion case to *Abbate*, held that a state conviction, after a federal acquittal on substantially the same facts, did not offend fourteenth amendment due process.

73. United States v. Lanza, 260 U.S. 377, 382 (1922).

though its preference for the practical canon of "efficiency" must have been conscious and meaningful. Thus, one should be cautious about invoking the "dual sovereignty" concept from the old double jeopardy cases. Moreover, even a different holding in the rare case of multiple federal and state prosecutions says relatively little about the extent to which the standards of one forum should apply in the other. In fact, substantive standards, procedural rules, sentences, and other dimensions will often vary as an inevitable consequence of our federal system. Some years ago, Professor Louis B. Schwartz remarked of the dual criminal law system:

> The effect of the choice of forum . . . may mean the difference between life and death, as under the federal kidnapping statute which authorizes the death penalty for an offense which in many states is not capital. Fornication, if criminal at all, is rarely punished by the states. Let the defendant transport his mistress across the state boundary and he becomes subject to the five-year penalty of the Mann Act. Similar differences of treatment depending on the choice between federal and state prosecution occur in connection with federal legislation against the mailing of obscene or indecent matter or lottery advertisements. Indeed, these federal offenses may include some activities entirely lawful under state law. . . .[74]

This review of three possibly relevant areas of federalism yields little of value to the *Smith* problem. It is quite true that state obscenity laws (whether more strict or lenient) are not preempted by the federal statutes, and are limited only by the first amendment; but that conclusion merely guarantees to the state law an evidentiary role which the *Smith* trial judge in fact gave to the Iowa statute. Much the same is true of the reference-incorporation issue; the district judge in an obscenity case probably would be permitted to give greater weight to state obscenity law in his instructions, but certainly need not do so — and, as we shall see shortly, may not use such a statute in a way that preempts the jury's own appraisal of community standards. Finally, the possibility of federal and state prosecutions for a single offense in no way ensures uniformity in the standards or procedures to be applied. These three areas of accommodation are helpful to a limited degree, but none suggests that the *Smith* court was wrong in its refusal to give greater deference to the Iowa obscenity law.

II. *Smith*, SMUT, AND THE FIRST AMENDMENT

Even though the *Smith* decision marks no new departure in federal-

74. Schwartz, *supra* note 30, at 72.

state relations, it does contribute several new dimensions to the ever-changing law of obscenity. The purpose of this concluding section is to review those implications, and assess the larger impact of the case.

First, the rejection of state law definitions in federal obscenity cases is significant by itself. Surely the Court's judgment about the irrelevance of Iowa's decriminalization of adult sales is not limited to the facts. One can imagine an even stronger case for resort to state law in which the answer presumably would be the same. For instance, suppose some 90% of the voters approved a state constitutional amendment not merely suspending the laws covering consenting adults, but forbidding all regulation of obscenity. Suppose, as well, that the language of the referendum clearly revealed a judgment of the citizenry that such conduct should be condoned and protected. If the somewhat narrower statute involved in *Smith* was thought irrelevant, there is little reason to believe that such a state constitutional amendment would fare better. In a federal prosecution, the Court has said that the jury makes its own determination of "contemporary community standards", regardless of views that others in the community may have expressed at the polls or through their lawmakers.[75]

If total state decriminalization would not stay the federal prosecutor, then presumably other provisions of state law — exemption of certain forms of dissemination, for example, would also be irrelevant. Many state obscenity laws contain specific exceptions for distribution which serves educational, scientific, literary or other purposes. These provisions have given teachers, librarians, and scientific researchers an assurance that their use and showing of otherwise obscene material for academic purposes would not risk criminal liability. While the soundness of that confidence is still unimpaired under state law, the prospect of a federal prosecution now looms. Thus the librarian should take care in mailing materials which might be thought obscene, since the dispensation given by state law is good only in the state courts.

The untying of federal and state law works both ways, of course. If a defendant in federal court can no longer rely on a state law exemption, he is also free to seek a common law *federal* exemption even where state law would not grant it.[76] Thus where the state law is unusually rigorous on

75. Miller v. California, 413 U.S. 15, 24 (1973); *See* Note, *Community Standard, Class Actions, and Obscenity under* Miller v. California, 88 HARV. L. REV. 1838, 1839-46 (1975).

76. *See, e.g.*, Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945), both of which suggest the possibility of a federal common law exception to 18 U.S.C. § 1461 for the dissemination through the mails of medical or scientific works containing material which would be judged obscene in less respectable contexts.

matters of obscenity, the federal defendant may actually fare better than he would have if Smith's position had been accepted by the Supreme Court. The likelihood of gaining general common law dispensation for educational, scientific, or literary uses of obscene materials may be remote, but at least the opportunity exists regardless of blanket prohibitions in state law.

There is one possible caveat about the conclusions under this first heading. The Supreme Court majority did refer briefly to the uncertain rationale and unstable condition of the Iowa law, aware that the ban on sales to adults had already been reinstituted and would become effective six months after the decision. The Court speculated that Iowa might have felt in 1974 that prosecutorial time and energy were better spent on other offenses; or that effort should be concentrated on sales to minors; or that "the State may have left distribution to consenting adults unregulated simply because it was not then able to arrive at a compromise statute for the regulation of obscenity."[77] Should the referendum hypothesized earlier be enacted as a clear declaration by the people of a state that certain conduct should be condoned, and not simply spared from the criminal law for a brief period, a different and possibly stronger argument could be made.

A second implication of *Smith* is that it increases to some degree the risks of "forum shopping". Since *Miller* there has been an invitation to prosecutors to institute "test cases" in parts of the country where convictions seem most probable, with the virtual assurance that success in Memphis will deter dissemination of a work in Los Angeles, even though conviction could not have been obtained initially in California.[78] The *Smith* case gives added significance to the choice between federal and state court; if the state law is less rigorous, prosecutors who have an option will undoubtedly move over to the federal courts. Conversely, if the state law is harsher than the general *Miller* standards applied in the federal courts, then anti-obscenity groups would presumably go to the state courts.[79]

---

77. Smith v. United States, 431 U.S. 291, 306 (1977).

78. *See* Morgan, *Pornography on Trial: United States Versus the Princes of Porn*, N.Y. Times, Mar. 6, 1977, § VI (Magazine), at 16. Consider the additional problem of the variability of standards and the choice of law in cases involving several states, analyzed in Schauer, *Obscenity and the Conflict of Laws*, 77 W. VA. L. REV. 377 (1975).

79. It should be noted, however, that since *Miller* represents a test of constitutionality, a standard any harsher than this may be subject to constitutional attack. *But see* Hamling v. United States, 418 U.S. 87, 103-10 (1974), where the Court recognized that states can constitutionally proscribe obscenity in terms of a statewide standard, whereas the appropriate community standard in a federal prosecution may be defined as the federal judicial district

Technically, a conviction in a federal court establishes only that the material in question is "nonmailable" and does not totally foreclose its distribution within the state. But only the hardiest or most heedless person would rely on the more favorable state law as a source of protection after a federal court conviction. Thus the choice of forum has great practical import, whatever may be the theoretical and constitutional differences.

Additionally, the *Smith* decision greatly enhances the role of the jury in obscenity prosecutions, in state courts as well as federal. The allocation of responsibility for standard-setting under the new obscenity doctrine had not previously been well defined. The 1974 cases did restate *Miller's* commitment of deference to the jury, applying in each case its own view of contemporary community standards. In *Jenkins v. Georgia*,[80] the Court observed that "the States have considerable latitude in framing statutes" under *Miller*, but went on to describe that "latitude" in rather limited terms: "A State may choose to define an obscenity offense in terms of 'contemporary community standards,' . . . as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*."[81] These statements, taken together, left some doubt about the relative roles of legislators and jurors. *Smith* resolved that doubt, quite clearly in favor of the jury: "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standards of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated."[82] The Court went on to clarify the kind of judgments which a state legislature might still make — defining the basic conduct and classifying the offenders to be regulated; defining the geographic area from which a jury would be chosen in obscenity cases; and regulating obscenity indirectly, through the zoning laws. Thus, the opinion concluded, "ample room is left for state legislation even though the question of the community standard to apply, when appeal to prurient interest and patent offensiveness are considered, is not one that can be defined legislatively."[83]

The discussion of legislative authority in *Smith* was in some sense

---

from which jurors are drawn to serve in a particular case. Thus it is possible for a state's *Miller* standard to be harsher than that of a federal judicial district within that state.

80. 418 U.S. 153 (1974).

81. *Id.* at 157.

82. Smith v. United States, 431 U.S. 291, 302 (1977).

83. *Id.* at 303.

dictum. The Court took the occasion, in reviewing a federal conviction, to say what state legislatures could and could not do even in state cases. The delineation of the legislative function was, of course, extremely important — if only because *Miller* had held that determination of obscenity reflected, *inter alia*, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the *applicable state law*."[84] *Smith's* new contribution was to say that once the legislature had established basic principles, their application was for the jury, drawing upon its own notions of community standards in a way that lawmakers could not preempt. The Court could well have decided *Smith* as a federal case without reaching this issue. The fact that the issue was reached may reveal its importance to the majority of the Court.

There is a special irony about the Court's stress upon the jury's function. *Miller* and later cases explained that a jury should be allowed to apply its own views on obscenity because it brought into the courtroom the values and mores of the community from which its members were chosen; the "average person" sitting on the jury was in the best position to know how the "average persons" in the rest of the community really felt about a given book, magazine or film.[85] Yet the Supreme Court in *Smith* held that the defense could not probe the views of prospective jurors on these very issues — understanding of current community standards, sources of such views, and information about the position which the legislature and other bodies had taken on the issue. The Court insisted that "[a] request for the jurors' description of their understanding of community standards would have been no more appropriate than a request for a description of the meaning of 'reasonableness' "[86] — a disposition which, among other shortcomings, neglects the critical fact that first amendment interests are at stake here, as they are not in the typical case where a jury is asked to decide whether conduct is "reasonable". If, moreover, such questions cannot be asked on voir dire, then the possibility exists that a highly *unrepresentative* body may exercise a function justified by the supposedly *representative* character of the jury. Presumably, *actual* prejudice could be shown on the part of a particular juror, and challenges for cause based on partiality have not been foreclosed. But the critical task of selecting the jury must increasingly be carried out in the dark.

---

84. Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added).

85. *See* Note, *Community Standards*, *supra* note 75, at 1845-47.

86. Smith v. United States, 431 U.S. 291, 308 (1977).

Further, *Smith* has compounded on already serious problem of uncertainty of obscenity standards. Until the *Miller* case, the uniform national standard — the "hard-core" or "Fanny Hill"[87] test — gave some guidance, despite its shortcomings. *Miller* revised the standard, by substituting the "lacks serious value" language for the more rigorous "utterly without" phrase.[88] It was not, however, the change in standard that created the major confusion. Under the arrangement which has evolved since 1973, each jury becomes essentially its own regulator of obscenity; the substantive standards, as the General Counsel of the American Library Association has recently observed, "are not ascertainable until the jurors are selected".[89] The only limits are the very broad ones set by *Miller* itself; but even there, if a jury acting under proper instructions finds that the material before it is lacking in redeeming qualities, that is effectively the end of the case. To prevail on appeal, the defendant would have to show that as a matter of law the material was so clearly meritorious that the jury should not have been allowed to find it otherwise. The progressive blurring of the standards and the narrowing of ground for appeal go hand in hand, and together they represent one of the most worrisome features of the obscenity law in the post-*Miller* era.

Finally, the task of the prosecutor in such cases has been progressively attenuated. A work may be submitted by itself, with no evidence of ways in which its content allegedly violates contemporary community standards (in terms of current views, expert testimony, availability of comparable publications, etc.). The practical burden falls on the defendant to establish that the work has redeeming literary or other value, and if he fails to do so, the jury is quite likely to convict simply on the basis of its own view of the work. Moreover, the prosecution is not required to show that anyone was offended or even affected by the material — even though the premise of obscenity legislation has been in part the affront to community values and mores. Mr. Justice Stevens, dissenting in *Smith*, pointed out that the magazines could hardly offend the persons who had ordered them, and that "delivery in sealed envelopes prevented any offense to unwilling third parties."[90] Thus, he concluded, "[s]ince his acts did not even constitute a

87. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966).

88. Miller v. California, 413 U.S. 15, 24 (1973).

89. North, *The Implications for Librarians*, FREEDOM TO READ FOUNDATION NEWS Spring-Summer 1977 at 9.

90. Smith v. United States, 431 U.S. 291, 321 (1977) (Stevens, J., dissenting).

nuisance, . . . they cannot provide the basis for a criminal prosecution."[91] To ease further the prosecutor's burden, the requirement of knowledge or scienter on the defendant's part has been diminished. The prosecution apparently need only prove that the material does indeed contain representations or descriptions of intercourse, etc., in order to convict for dissemination. The defendant may be presumed to have such knowledge, although the presumption is not conclusive.[92] Although the Supreme Court has never abandoned its early insistence on proof of scienter in obscenity cases,[93] the proof which will meet that requirement appears to have steadily lessened.

The *Smith* case, more on its facts than in the language of the opinions, confirms and extends this trend toward a "per se" view of obscenity law. If the prosecution need only show that certain publications were sent through the mails by a person who knew they contained certain pictures or words within the *Miller* definition, then the practical burden of the trial falls very heavily indeed on the defendant. The problems of conducting such a defense are, of course, compounded by the difficulty of determining in advance of submission what standards the jury may derive from the community it supposedly represents.

III. CONCLUSION

The *Smith* case contains several curious and ironic twists. Perhaps the most unfortunate of these is the route by which the case reached the Supreme Court in the first place. Shortly after Smith's conviction in the federal district court, the Freedom to Read Foundation of the American Library Association took over the appeal, and pressed the case through to the Supreme Court.[94] The ALA also filed an amicus curiae brief in the Supreme Court, arguing broader constitutional grounds for reversal than those stressed in the petitioner's brief.[95] Had there been full appreciation

91. *Id.*

92. North, *supra* note 89, at 9.

93. Smith v. California, 361 U.S. 147 (1959). Shortly after the *Smith* decision, Professor Kalven wondered whether the vagueness of obscenity, coupled with this rather strict scienter requirement, might "so bedevil the efforts to prove *scienter* that the effective enforcement of regulation against the dissemination of obscene matter [would] collapse at the prosecution of the bookseller, the key link in the chain of distribution." Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 37.

94. *See* Newsletter on Intellectual Freedom, FREEDOM TO READ FOUNDATION NEWS, date not available).

95. Amici Curiae Brief of the American Library Association and the Iowa Library Association, Smith v. United States, 431 U.S. 291 (1977).

of the possible impact of an adverse decision, those concerned with freedom of expression and inquiry might have been better advised to let the case rest at the trial level. But the optimism which ALA and others had at the outset was certainly well founded. *Miller* and the 1974 obscenity cases surely suggested that state law would play an important role. If a state decided to exempt certain conduct from its obscenity laws, there was reason to suppose that exemption might also stay the hand of the federal prosecutor. Thus the decision to press the *Smith* issue was a wholly rational and defensible one. The outcome was unfortunate, in ways that could not have been anticipated. Not only did the Supreme Court fail to expand the potential role of protective state law in the federal courts, but actually cast doubts on the potential value of such law in state proceedings. Perhaps, under these conditions, *Smith* is an unhappy chapter best forgotten.